IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VLADIMIR V. MISHKOV, Appellant.	)	No. 63378-3-I DIVISION ONE UNPUBLISHED OPINION FILED: June 7, 2010

Appelwick, J. — Vladimir Mishkov appeals his conviction of felony indecent exposure. Finding that the evidence was sufficient to support the jury's verdict and that Mishkov was not denied effective assistance of counsel, we affirm the conviction. We accept the State's concession of sentencing error, however, and accordingly remand for resentencing.

FACTS

Mikele Scheffer was shopping in a retail store when the defendant, Vladimir Mishkov, whom she had not met before, began to make her uncomfortable by circling around her and following her very closely. Mishkov left the store when Scheffer got in line to pay for her purchases, however, so she did not report his behavior.

When Scheffer left the store she had to walk between two parked vehicles to get

to her car. One of them was a brown Jeep. As Scheffer walked next to it, Mishkov, who was seated inside, rolled down the window and whistled for Scheffer's attention. When Scheffer looked at him she could see he had reclined his seat, was wearing no pants and was vigorously masturbating. Frightened, Scheffer locked herself in her car and called the police, describing Mishkov and his vehicle in detail. She tried to block Mishkov's car with her car when he began to drive away, because she was afraid his behavior might escalate, but he backed around her. She reported the direction he took when he drove away, and the police located Mishkov nearby, still in the Jeep, within a few minutes. Scheffer positively identified Mishkov at the scene.

The State charged Mishkov with one count of indecent exposure as a felony, based on the allegation that he had "previously been convicted of Indecent Exposure, a sex offense as defined in RCW 9.94A.030."

At trial, the State sought to admit into evidence facts underlying Mishkov's recent conviction for indecent exposure under ER 404(b). The court denied the motion as to the State's case in chief, but left open the possibility of introducing the evidence as rebuttal depending on the nature of the defense.

To prove Mishkov's prior indecent exposure offense as a necessary element of the charge, the State provided a certified copy of the judgment and sentence. Defense counsel said she preferred to offer a stipulation. After the State presented its witnesses, the parties presented a stipulation to Mishkov's prior offense,

> The parties stipulate that on November 12, 2008, the defendant Vladimir Mishkov (date of birth is 4/16/1986), had been previously convicted of the crime of Indecent Exposure, a sex offense as defined in RCW 9.94A.030.

The defense called no witnesses. Mishkov was convicted, and now appeals.

DISCUSSION

Mishkov first contends that the evidence was insufficient to support his conviction of indecent exposure as a felony. To convict Mishkov of indecent exposure as a felony, the State was required to prove that he intentionally made an "open and obscene exposure of his . . . person . . . knowing that such conduct is likely to cause reasonable affront or alarm" and that he had "previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030." RCW 9A.88.010(1), (2)(c). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Because Mishkov stipulated to his prior conviction of indecent exposure, the evidence clearly was sufficient to establish the alternative statutory element that he had, in fact, previously been convicted "under this section." RCW 9A.88.010(2)(c). Mishkov nonetheless argues that the evidence was insufficient, because of the way the State charged his offense. He first argues that the information was legally incorrect, because indecent exposure is not actually a "sex offense" listed in RCW 9.94A.030. Because of this charging error, he then reasons, the State failed to meet its burden of proving each necessary element of the offense, regardless of his stipulation.

Although we agree that indecent exposure does not constitute a "sex offense" under RCW 9.94.030, we disagree that the error in the information required the State to

prove to the jury that it was.

Mishkov's argument that the State failed to prove all necessary elements is based entirely on his premise that the information charged him "solely with committing indecent exposure after having been convicted of a sex offense as defined in RCW 9.94A.030(46)." But that is not what the information alleged. The information actually correctly alleged that Mishkov had previously been convicted of "Indecent Exposure," even as it also incorrectly alleged that such a conviction is "a sex offense as defined in RCW 9.94A.030." The State thus did allege the necessary fact of a prior conviction of indecent exposure. Under these circumstances, the erroneous additional allegation that indecent exposure is legally classified as a sex offense constituted mere surplusage, which does not of itself entitle Mishkov to relief absent a showing of prejudice. See State v. Stritmatter, 102 Wn.2d 516, 524, 688 P.2d 499 (1984). Mishkov has made no argument for actual prejudice here, and none is apparent.[1] His claim of evidentiary insufficiency thus fails.

Mishkov next contends that he was denied effective assistance of counsel when his trial counsel entered the stipulation regarding his prior offense. In order to establish ineffective assistance of counsel, Mishkov must demonstrate both (1) that his attorney's representation fell below an objective standard of reasonableness, and (2) resulting

[1] Other appellants have successfully argued that failing to prove an otherwise unnecessary element does create an issue of evidentiary insufficiency under the "law of the case" doctrine, in which jury instructions to which there is no objection establish governing law for that proceeding. See State v. Hickman, 135 Wn.2d 97, 101–02, 954 P.2d 900 (1998). However, as Mishkov apparently recognizes in declining to base his argument on the instructions here, such a claim would fail because it is the law of this case that Mishkov's prior conviction was for a sex offense. Jury instruction no. 9 read, "Indecent exposure is a sex offense."

prejudice, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). There is a strong presumption of effective representation, and the defendant carries the burden of demonstrating there was no legitimate strategic or tactical rationale for the challenged conduct. McFarland, 127 Wn.2d at 335.

Mishkov contends that his counsel provided deficient performance by failing to offer to stipulate that his prior offense was for an unspecified sex offense rather than for indecent exposure. In making this argument, however, he fails to consider the position his counsel was placed in by the circumstances. Scheffer had testified not only that Mishkov exposed himself to her, but that he also apparently targeted her first in the store. Given that evidence, reasonable minds could differ as to which of the two forms of stipulation was worse: allowing jurors to learn that Mishkov had previously committed an unnamed sex offense, potentially as serious as rape, or that he had committed the comparatively minor but identical offense of indecent exposure. C.f. State v. Gomez, 75 Wn. App. 648, 655 n.10, 880 P.2d 65 (1994) (in context of ER 609 impeachment "there are circumstances in which counsel may decide that jury speculation about the nature of the prior conviction is more prejudicial than naming the crime.").

Mishkov's reliance on State v. Johnson, 90 Wn. App. 54, 62–63, 950 P.2d 981 (1998) and State v. Young, 129 Wn. App. 468, 476, 119 P.3d 870 (2005) is misplaced. Neither Johnson nor Young involved a claim of ineffective assistance, and in each of those cases it was only legally necessary to prove the defendant had been convicted of

some felony, not a specified crime or type of crime. Here, in contrast, defense counsel was confronted with the difficult choice of allowing the judgment and sentence of Mishkov's recent conviction for indecent exposure to go to the jury, stipulating that he had been previously convicted of that specific offense, or stipulating to an unnamed "sex offense." Because reasonable minds could differ as to the least harmful of these options, Mishkov has failed to rebut the strong presumption of competence of counsel.[2]

Moreover, even assuming deficient performance, Mishkov has not shown a reasonable probability that, but for his trial counsel's choice to name the offense rather than allowing the jury to speculate as to the nature of an unspecified prior sex offense, the result of his trial would have differed. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Mishkov does not attempt to show specific prejudice in the context of his case, essentially asserting that, under Johnson and Young, evidence of the same prior offense automatically creates reversible error. Neither case stands for that proposition, however, as demonstrated by the fact-specific analysis of prejudice in each opinion. See Johnson, 90 Wn. App. at 74 (prior similar offense evidence insufficient to mandate reversal by itself, but added to accumulated prejudice of other errors); Young, 129 Wn. App. at 477–78 (trial irregularity of identifying defendant's prior conviction required

[2] We do not rely on the State's alternative argument that stipulating to a prior "sex offense" would have been legally improper because indecent exposure is not a sex offense under RCW 9.94.030. As noted above, jury instruction no. 9, to which neither party objected, established that indecent exposure was a "sex offense" for purposes of Mishkov's prosecution under the "law of the case doctrine." Hickman, 137 Wn. 2d at 101–02. Accordingly, such a stipulation would have been legally sufficient had counsel offered it.

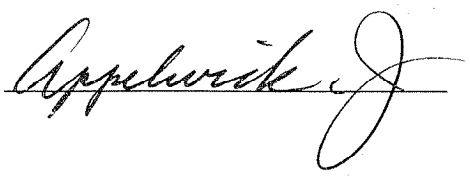
reversal when the evidence was not cumulative, no curative action was taken, there were inconsistencies among the state's witnesses, and the evidence was not overwhelming).

Here, Scheffer reported the incident as soon as it happened, immediately identified Mishkov, and was not substantially impeached by any material discrepancies in her statements. Much of her 911 call was admitted into evidence and it was consistent with her testimony. Officers provided corroboration in recounting Scheffer's immediate positive identification of Mishkov, in their observation that Mishkov's car seat was still reclined as Scheffer had observed, and in determining that Mishkov's vehicle had switched license plates. There was no evidence suggesting that Scheffer was likely to have mistaken what she saw, to have misidentified Mishkov, or had any reason to fabricate her testimony. Even if counsel had stipulated to an unspecified sex offense conviction, as Mishkov claims she should have done, there was no reasonable likelihood of a different outcome. Mishkov's claim of ineffective assistance therefore independently fails even if his counsel's performance was deficient.

Finally, after this case was set for consideration without oral argument, the parties by motion have drawn our attention to the recent opinion from Division II of this court in State v. Steen, ___ Wn. App. ___, 228 P.3d 1285 (2010). Steen holds that when, as here, the gross misdemeanor of indecent exposure is elevated to a class C felony because of a prior conviction, unless the victim is under 14 years of age, the sentencing court should determine the applicable standard range by classifying the offense as an unranked felony rather than as a seriousness level IV offense. Steen,

228 P.3d at 1287–88. We accept the State's concession that a remand for resentencing is required under Steen, because it is clear that the victim in this case was not under the age of fourteen.

Conviction affirmed, remanded for resentencing under the correct standard range.



WE CONCUR: